No. 82-1269

In The

Supreme Court of the United States

October Term, 1982

LLOYD L. FINK,

Appellant,

-vs-

BOARD OF EDUCATION
OF WARREN COUNTY SCHOOLS,

Appellee.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Are the school laws of Pennsylvania unconstitutionally applied to a teacher whose religious activity in the classroom is held to violate sections of the law which contain absolutely no prohibitions and simply authorize silent meditation and the study of the Bible as literature?

2. Does a public school teacher violate the "Establishment Clause" of the First Amendment by conducting religious activity in his classroom contrary to his supervisors orders?

3. Do the Constitutional guarantees of Freedom of Speech, Free Exercise of Religion and Academic Freedom allow a teacher to conduct religious exercises in his classroom?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
GROUND OF JURISDICTION OF SUPREME COURT	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF CASE	3
THE QUESTIONS ARE SUBSTANTIAL	8
CONCLUSION	14
APPENDIX A - Commonwealth Court Opinion decided March 15, 1982	1a
APPENDIX B - Teacher Tenure Opinion of the Secretary of Education of Pennsylvania dated May 18, 1979	30a
APPENDIX C - Notice of Appeal filed December 17, 1982	49a

AUTHORITIES CITED

CASES CITED: Page

School District of Abington TWP, PA V Schempp 374 U.S. 203 (1963) 8, passim

Grayned V City of Rockford 408 U.S. 104 (1971) 9

Lynch V Indiana U. Board of Trustees 378 NE 2d 900 (1978) 13

Pickering V Board of Education 391 U.S. 563 (1965) 10

Smith V Goguen 415 U.S. 566 (1973) 11

Tinker V Des Moines Independent Community School District 393 U.S. 503 (1969) 10

Walz V Tax Commission 347 U.S. 664 (1970) 11

Wisconsin V Yoder 406 U.S. 205 (1972) 12

Zorach V Clauson 343 U.S. 306 (1972) 11

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No.

LLOYD L. FINK

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VS

BOARD OF EDUCATION OF WARREN COUNTY SCHOOLS

Appellee

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Commonwealth Court which appears on the appendix at page 1a, is reported at 442 A.2d 837.

The Teacher Tenure Opinion of the

Secretary of Education of Pennsylvania, which appears in the appendix at page 18a, is reported at Department of Education Tenure Opinions, Vol.VIII, page 136.

GROUNDS OF JURISDICTION OF SUPREME COURT

This is an Administrative Agency Appeal from The Order of the Commonwealth Court, entered March 15, 1982 which affirmed the dismissal of Lloyd Fink as a professional employee of the Warren County School District. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on September 30, 1982.

A Notice of Appeal to this Court was filed in the Commonwealth and Supreme Courts of Pennsylvania on December 17, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2)

CONSTITUTION PROVISIONS AND STATUTES

The following constitutional provisions are pertinent:

Fourteenth Amendment, United States Constitution. ...nor shall any State deprive any person of life, liberty, or property without due process of law:

First Amendment, United States Constitution;

Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech.

The following Statutes set forth in the Appendix are pertinent:

Section 1516.1 of the School Code, 24 P.S. sec. 15-1516.1

Section 1515 of the School Code, 24 P.S. sec. 15-1515

STATEMENT OF THE CASE

Lloyd L. Fink was a tenured professional employee of the Warren County, Pennsylvania School District from 1972 until 1978 at

which time his employment was terminated by the School Board because he was conducting religious activity in his classroom. For several years during his employment, Mr. Fink had read aloud from the Bible in the morning and afternoon sessions of his class and also recited the Lord's Prayer as part of the opening exercises in his elementary school classroom. In January, 1978 parents of two students in Fink's class met with the Acting Superintendent of Schools concerning the religious activity in Finks classroom. As a result of this meeting, the Acting Superintendent met with Mr. Fink on February 3, 1978 and informed him that, based upon his understanding of the laws of Pennsylvania and the decision of the U.S. Supreme Court in ABINGTON, Mr. Fink was prohibited from conducting any religious activity in his classroom, and that Fink's job could be placed in jeopardy if he continued this activity. As a result of this meeting, Fink ceased both

the reading from the Bible and the recitation of the Lord's Prayer, and, in an attempt to reach an acceptable accomodation, but without giving up his rights completely, he substituted other activity of a religious nature. Instead of the Lord's Prayer, Fink began saying an extemporaneous, spontaneous prayer with his eyes closed and head bowed which lasted approximately one half minute, without comment and without asking for student participation. And instead of reading the Bible in the morning, Fink read from a book entitled Bible Story Volume VII. Mr. Fink discontinued the afternoon religious activity completely.

By letter dated February 7, the acting Superintendent ordered Fink to cease and desist from all religious actions in his classroom. Lloyd Fink declared his intention to continue the activity claiming that his right to do so was guaranteed under the

United States Constitution.

After notice and hearing, Lloyd Fink's contract of employment with the School District was terminated, as of April 11, 1978. At the hearing, Fink testified that his activities had violated no law and that he was exercising rights guaranteed to him under the United States Constitution.

Under the provisions of the School Code, Fink appealed his dismissal to the Secretary of Education of Pennsylvania. On May 18, 1979 the Secretary dismissed his appeal and affirmed the dismissal. The Secretary held that Finks religious activity was a direct violation of two sections of the School Laws, Section 1515(a) and 1516.1 of the Code. The first section authorized a period of silent meditation in the school and the later authorized the study of the Bible as literature in secondary schools. The Secretary did not consider the application of Finks constitutional

rights, citing that as an administrative agency, the Department of Education was without power to consider them. In his opinion, the Secretary noted that Fink has raised Constitutional issues and they were preserved for appeal.

Mr. Fink appealed the Secretary's decision to the Commonwealth Court, raising the very issues sought to be reviewed here by brief and oral argument. Fink again claimed that his activities were protected by his Constitutional rights to Freedom of Speech, Free Exercise of Religion, and Academic Freedom. He further questioned the Constitutionality of the Statutes as applied to him, claiming they were facially overbroad and void for vagueness because they contained no prohibitory or restrictive language at all.

On March 15, 1982, the Commonwealth Court affirmed Lloyd Finks dismissal. The Court directly considered the issues raised by Mr.

Fink and held that his constitutional rights had not been violated.

The Court upheld the validity of the two sections of the School Law against their constitutional attack and held that Finks activity was a direct violation of the Establishment Clause.

On September 30, 1982, the Supreme Court of Pennsylvania, without comment, denied Finks Petition for Allowances of Appeal.

THE QUESTIONS ARE SUBSTANTIAL

Lloyd Fink's religious activity was not a violation of Sections 1515(a) and 1516.1 of the School Code. Those sections simply reflect an attempt by the legislature to enact legislation concerning prayer and Bible reading in the school that would be constitutionally permissible after ABINGTON SCHOOL DISTRICT V SCHEMPP 374 U.S. 203 (1963), which struck down the original section 1516 of the code. Lloyd Fink has never claimed to have

conducted any activity under either of these sections. Fink has acted only upon claim of Constitutional right. The lower Courts finding that Fink has violated these two sections is shockingly wrong and raises substantial Constitutional questions.

It is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined GRAYNED V CITY of ROCKFORD 408 U.S. 104 (1971)

These sections, which simply authorize and mandate certain activities in the classroom cannot reasonably be construed as a prohibition on all other religious activity. As applied, these sections are void for vagueness.

Additionally, by interpreting and applying these sections as a ban on any religious speech or observance in Mr. Finks classroom, the Commonwealth Court has rendered the statute unconstitutional under the First Amendment Freedom of Speech and Free Exercise

Mr. Fink tried to compromise and even changed his activities. The law as interpreted becomes unconstitutionally overbroad because of its application to expression sheltered by the First Amendment. SMITH V GOGUEN 415 U.S. 566 (1975).

The law, when applied as a legislative ban on religious activity in the school, exhibits hostility toward religion contrary to the "accomodating neutrality" required by the Constitution as expressed in numerous decisions of this Court. ZORACH V CLAUSON 343 U.S. 306 (1952); WALZ V TAX COMMISSION, 397 U.S. 664 (1970). And further, it is an impermissible interference with Fink's Free Exercise of Religion. The lower Court rejected Finks claim that this right was violated after making a religious belief/ religious action distinction and finding that religious actions could be prohibited. But that analysis is in conflict with the basic

principles previously announced by this Court in a series of cases since 1961 culminating in WISCONSIN V YODER 406 U.S. 205 (1972). Those cases have limited the governments ability to regulate religious actions and have balanced the burden on the activity against the state's interest in regulation requiring a showing of a compelling state interest to justify the regulation. The State could not show this compelling interest. While conceding the necessity of regulation to allow the orderly conduct of the schools, the state has no reason to place a total ban on religious activity in Fink's classroom.

The Commonwealth Court has held that because of Fink's government employment, his individual religious activity has violated the Establishment Clause of the First Amendment. That simple agency analysis expands the Establishment Clause beyond both its literal and interpreted scope and deprives public

employees of their Constitutional rights. It further ignores the prohibition contained in the Free Exercise Clause. An individual acting under claim of constitutional right cannot violate the Establishment Clause. The Lower Court has misinterpreted the decision of this Court in ABINGTON and has committed plain error.

It has been almost 20 years since the ABINGTON decision and yet the place of prayer in the public schools is one of the major topics in America today. The constitutional principle in ABINGTON has been widely interpreted. But that decision has now been expanded to deny individual liberties and to prohibit all religious activity in the school. That expansion effects millions of persons, teachers and students directly and all Americans indirectly.

Over the years, many federal courts have interpreted the Establishment Clause in light

of ABINGTON. And without exception, all have required some showing of collective government action involving religious activity, whether it be the action of the legislature or a political subdivision, before finding a violation of the Establishment Clause. Now, based on a misinterpretation of those federal cases, Pennsylvania joins Indiana (Lynch V Indiana University Board of Trustees 378 N.E. 2d 900 (1978) cert. denied 441 U.S. 946 (1979)), becoming the second state to drop the requirement of collective government action to find a violation of the Establishment Clause.

This extreme expansion of the Clause, and the courts holding that religious activity is banned in the school, raise issues involving the most fundamental of our constitutional rights that must be settled by this Court.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration

by the Court for their resolution.

Respectfully submitted,

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December 1982

APPENDIX A

FINK V. BD. OF ED. OF WARREN CTY. SCHOOL
Cite as, Pa. Cmwlth., 442 A.2d 837

Lloyd F. FINK, Petitioner,

v.

The BOARD OF EDUCATION OF the WARREN COUNTY SCHOOL DISTRICT, Respondent.

Commonwealth Court of Pennsylvania.

Argued Dec. 15, 1981.

Decided March 15, 1982.

Public school teacher brought action challenging determination of Secretary of Department of Education affirming school board's decision terminating teacher's employment. The Commonwealth Court, No. 1261 C.D. 1979, MacPhail, J., held that: (1) elementary public school teacher's action in conducting religious exercises at the beginning of each school day, including an audible extemporaneous prayer and the reading of a Bible story, violated the establishment clause, and was not authorized by state law; (2) school teacher's right to free exercise of

APPENDIX A

religion did not give him the right to conduct religious activities in his classroom; and (3) school teacher's refusal to comply with superintendent's directives to cease religious exercises in classroom was a valid cause for teacher's termination.

Affirmed.

1. Schools 141(5)

On appeal from order of Secretary of Department of Education affirming school board's decision terminating school teacher, it was the duty of Commonwealth Court to affirm Secretary's order unless there was a violation of constitutional rights, an error of law, an abuse of discretion, or if a necessary finding of fact was unsupported by substantial evidence.

2. Schools 141(5)

Evidence before Secretary of Department of Education sustained finding that elementary public school teacher's religious activities in classroom and his refusal to comply with super-

intendent's directives to cease those religious activities constituted a violation of school laws and persistent negligence warranting dismissal.

3. Schools 141(4)

Elementary public school teacher's religious exercises, including an audible extemporaneous prayer, violated state statute which permits school teachers, at the opening of school, to conduct a brief period of silent prayer or meditation with the participation of all pupils, since the school teacher's exercises were of a "religious" nature and the prayer was said aloud. 24 P.S. §15-1516.1.

4. Statutes 47

Test for whether statute is void for vagueness is whether the statute gives person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.

5. Schools 141(4)

Statute permitting public school teacher,

at the opening of every school day, to conduct a brief period of silent prayer or meditation, if the prayer or meditation is not intended to be and not conducted as a religious service or exercise, but is instead considered as an opportunity for silent prayer or meditation on a religious theme, is not void for vagueness. 24 P.S. §15-1516.1.

6. Constitutional Law 84

Schools 141(4)

Elementary public school teacher's action in conducting religious exercises at the beginning of each school day, including an audible extemporaneous prayer, and the reading of a Bible story, violated the establishment clause, and was not authorized by state law. U.S.C.A. Const. Amends. 1, 14; 24 P.S. §15-1516.1.

7. Schools 141(4)

Elementary public school teacher's right to free exercise of religion did not give him the right to conduct religious activities in his class-

APPENDIX A

room. U.S.C.A. Const. Amends. 1, 14.

8. Constitutional Law 84

The freedom to hold religious beliefs is absolute; conduct in consequence of such beliefs, however, may be regulated or even prohibited by state in the interest of peace, order and tranquility in society. U.S.C.A. Const. Amends. 1, 14.

9. Schools 141(4)

Elementary public school teacher's right to academic freedom did not give him the right to conduct religious activity in classroom. U.S. C.A. Const. Amends. 1, 14.

10. Constitutional Law 90.1(1)

The concept of academic freedom is a species of the right to freedom of speech, and teacher's right must yield to compelling public interests of greater constitutional significance. U.S.C.A. Const. Amends. 1, 14.

11. Schools 141(4)

Elementary public school teacher's refusal

to comply with superintendent's directives to cease religious exercises in classroom was a valid cause for teacher's termination. 24 P.S. §§ 15-1515(a), 15-1516.1.

12. Schools 141(4)

Superintendent of public school had authority to request elementary school teacher to refrain from conducting religious activity in the classroom.

Gibbs & Craze, Cleveland, Ohio, James Patrick McGarriety, Philadelphia, for petitioner.

Joseph A. Massa, Jr., Warren, for respondent.

Before CRUMLISH, President Judge, and MENCER, ROGERS, BLATT, WILLIAMS, CRAIG and MacPHAIL, JJ.

MacPHAIL, Judge.

Lloyd F. Fink (Petitioner) appeals to this Court from a determination of the Secretary of the Pennsylvania Department of Education (Secretary), which affirmed the decision of the Board of School

APPENDIX A

Directors of the Warren County School District (School Board), terminating Petitioner's employment on the grounds of persistent negligence and persistent and willful violation of school laws.[1]

Petitioner was a tenured school teacher from 1973 to 1978. He worked under a professional employee contract at the Irvine Elementary School in Warren County. On April 10, 1978, at their monthly meeting, the School Board unanimously voted to permanently terminate Petitioner's employment. Written notice was sent to Petitioner on April 11, 1978 and a hearing was held on May 18, 1978 before the School Board.

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1. The School Board found that Petitioner's recitation of a spontaneous prayer, daily reading of a Bible story and willful, persistent and continuous refusal to obey the reasonable orders of the Acting Superintendent of Schools of the Warren County School Districts were violations of Section 1122 of the Public School Code of 1949(Code), Act of March 10, 1949, P.L. 30, as amended, 24 P.S. 11-1122, which states that persistent negligence and persistent and willful violations of the school laws of this Commonwealth are a valid cause for the termination of a professional contract.

APPENDIX A

At that hearing evidence was presented from which the School Board found as a fact that Petitioner had been conducting activities of a religious nature in the classroom. According to the findings of the School Board, the Petitioner opened both the morning and afternoon sessions of school by saying the pledge of allegiance, the Lord's Prayer and by reading a Bible story[2] to his fourth grade class. If the children were unaware of the meaning of a word or phrase used in the Bible story, Petitioner would explain it to them, but otherwise did not sermonize to his students. When the parents of two students objected to Petitioner's conduct involving prayer in the classroom, the principal of Irvine suggested that those children be excused from class

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2. The book used by Petitioner was entitled A. Maxwell, Bible Story Volume VII(1956). Petitioner read from this book for approximately three years, but before then he read from the Bible itself.

APPENDIX A

during the opening exercises. Pursuant to this suggestion, those children were instructed to learn the Preamble to the United States Constitution. At first, these children were kept in the hallway-but later were instructed to go to the library during the religious activities. By February 3, 1978, Mr. John Binney, Acting Superintendent of the Schools, met with Petitioner and informed him that the religious activities he was engaging in during school time were prohibited activities and that their continuance would place Petitioner's job in jeopardy. Mr. Binney told Petitioner to cease and desist from these religious practices. On February 7, Mr. Binney sent a follow-up letter to Petitioner asking him to stop the objectionable activities.

Although Petitioner did discontinue the religious activities in the afternoon session, he continued to say an audible extemporaneous prayer (instead of the Lord's Prayer) and to read one Bible story in the morning. During this

time of prayer Petitioner stood with his head bowed and his eyes closed for approximately one-half minute. Students were never requested to participate in these prayers. Petitioner testified that he believed he had a constitutional right to do what he was doing and that he felt a need to ask God for His guidance at the beginning of each new school day. Petitioner testified that he was not attempting to proselytize his students.

On February 10, 1978, the principal again requested that Petitioner stop his activities completely and warned of the ramifications if he failed to do so. Nonetheless, Petitioner declared his intention to continue and was thereupon suspended from his employment pending a hearing before the School Board.

From those findings, the School Board concluded that Petitioner's conduct constituted a violation of the school laws and persistent negligence and, accordingly, dismissed him. In the opinion of the Secretary dismissing Peti-

tioner's appeal, the findings of fact and conclusions of law of the School Board were affirmed.

[1,2] It is the duty of this Court to affirm the order of the Secretary unless there was a violation of constitutional rights, an error of law, an abuse of discretion, or if a necessary finding of fact was unsupported by substantial evidence. **Gobla v. Crestwood School District, 51 Pa. Commonwealth Ct. 539, 414 A.2d 772(1980).** We find no infirmity in the findings of fact nor do we find an abuse of discretion. Substantial evidence exists in the record to support each finding. Indeed, with very few exceptions of a minor nature, there is no conflict in the evidence. We must, therefore, look to the constitutional issues raised to determine whether a violation of constitutional rights occurred and to determine whether a refusal to comply with the superintendent's directives to cease religious exercises in the classroom was valid cause for termination of the contract of a public school teacher on the

grounds of "persistent negligence" and "persistent and willful violation of the school laws" of the Commonwealth of Pennsylvania.

In his appeal, Petitioner raises several constitutional issues which we shall discuss seriatim.

1. Does an elementary public school teacher violate the Establishment Clause of the First Amendment by conducting religious activity in the classroom contrary to his supervisor's orders?

The First Amendment to the Constitution of the United States provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..." U.S. Const. amend. I. Through the Fourteenth Amendment, the First Amendment has been made fully applicable to the states. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

Our United States Supreme Court has interpreted the First Amendment and held that the "Establishment" Clause prohibits a state or federal government from placing official support

behind the tenets of one or of all orthodoxies. Abington School District v. Schempp, 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844 (1963). In Abington the Court found that the mandatory reading of verses from the Bible and recitation of the Lord's Prayer during opening exercises of the school were "religious" in nature.[3] The Court held: "Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause." Id. at 223, 83 S.Ct. at 1572 (emphasis added). In Engel v. Vitale, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962), the Court explained that these exercises are not mitigated by the fact that

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3. In Abington, deciding companion cases, the Supreme Court ruled a Pennsylvania statute which required that ten verses of the Bible be read and the Lord's Prayer recited each day in public schools was violative of the Establishment Clause and held the "rule" of the Board of School Commissioners of Baltimore City, which was similar to the Pennsylvania statute, to be violative of the Establishment Clause also.

individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.

[3] Of course, the Petitioner points out that Abington did not bar all religious activities in the public schools but rather the decision was limited to a determination that the state's requirement that there be Bible reading and prayer in the schools was unconstitutional because it violated the state's mandated neutrality under the Establishment Clause. Seizing upon language in Abington, 374 U.S. at 225, 83 S.Ct. at 1573, that, "[n]othing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment", Petitioner contends that his religious activities were not compulsory and that the Commonwealth has enacted a law which indeed, according to Petitioner, authorizes the very

activities conducted by him. The statute to which Petitioner has reference is Section 1516.1 of the Code, 24 P.S. §15-1516.1 which reads as follows:

> (a) In each public school classroom, the teacher in charge may, or if so authorized, or directed by the board of school directors by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent prayer or meditation with the participation of all the pupils therein assembled.
>
> (b) The silent prayer or meditation authorized by subsection (a) of this section is not intended to be, and shall not be conducted as, a religious service or exercise, but shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day.

Petitioner argues that his conduct was per-

missible under this statute and if prohibited thereby, the statute is void for vagueness.

It will be noted, of course, that the silent prayer or meditation authorized by the statute must not be conducted as a religious service or exercise and that the prayer or meditation must be silent. That the primary effect and purpose of the Petitioner's opening exercises were of a "religious" nature is apparent from the evidence presented and corroborated by Petitioner's own testimony. When asked under oath, "What was the purpose of this prayer?", Petitioner responded, "I feel that I needed help to be a good teacher to do what I should during [sic] the classroom. I asked for help and guidance." We note that if that was the purpose then what Petitioner did was a religious exercise. In addition, subsection (a) says that the prayer shall be "silent". Petitioner's prayer was said aloud and in a prayerful stance. Clearly, Petitioner's prayers were in violation of and not authorized by Section 1516.1.

APPENDIX A

[4,5] We see nothing in the statute which would render it void for vagueness. The test is whether the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. **Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct.2294, 33 L.Ed.2d 222 (1972).** Petitioner maintains that by authorizing certain activities but prohibiting others, the statute is necessarily vague. This is strained legal reasoning at best. It is clear to us that when the legislature enacted **Section 1516.1** it was endeavoring to implement what **Abington** held to be permissible under the United States Constitution; no more and no less. As such, the statute withstands Petitioner's constitutional attack for vagueness.

[6] We affirm the conclusions of the School Board and the Secretary that Petitioner's activities were in violation of the Establishment Clause and were not authorized by **Section 1516.1 of the Code.**

APPENDIX A

II. Does an elementary public school teacher's right to freedom of speech, free exercise of religion, and right to academic freedom protect his saying of a prayer and reading of Bible stories to his fourth grade class?

[7,8] We find that these constitutional rights of Petitioner were not violated. An elementary public school teacher's right to free exercise of religion does not give him the right to conduct religious activities in his classroom. It is well established that the freedom to hold religious beliefs is absolute: conduct in consequence of such beliefs, however, may be regulated or even prohibited by the state in the interest of peace, order and tranquility in society. Poulos v. New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953). In Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965), cert. denied, 382 U.S. 957, 86 S. Ct. 435, 15 L.Ed.2d 361 (1965) it was held that the constitutional rights of free exercise of

religion and freedom of speech do not require a state to permit "student-initiated" prayers in public schools.[4] The Court there went on to explain that "[n]either provision requires a state to permit persons to engage in public prayer in state-owned facilities wherever and whenever they desire." Id. at 1001. The Court concluded that the parents of children who instituted that litigation would have to be content to have their children pray "before nine and after three." Id. at 1002.

Here, Petitioner had been placed in a position of authority by the Commonwealth. When he was praying and reading religious material he was utilizing the power, prestige and influence conferred upon him by reason of his position as a teacher. Certainly, if a student's constitutional rights of free exercise of religion and freedom of

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4. In Stein, parents of several public school students sought an injunction requiring New York state to allow students to recite prayers on their own initiative.

speech do not require the state to permit student-initiated prayers during regular classtime, a teacher, who in a real sense represents the Commonwealth and the School Board, similarly cannot demand that he be permitted to initiate personal prayer when teaching. Furthermore, Petitioner's position as a teacher renders his actions in direct violation of the Establishment Clause. In Lynch v. Indiana University Board of Trustees, Ind.App., 378 N.E.2d 900 (1978), cert. denied, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979), Lynch was a teacher at a state university who insisted on reading the Bible aloud at the beginning of each class. When told to stop his practice, Lynch refused whereupon he was discharged. In his court action for reinstatement, Lynch raised basically the same arguments as Petitioner in the instant case. The Court of Appeals of Indiana held that while the State had not directly participated in the Bible reading by Lynch, something the State was

APPENDIX A

clearly prohibited from doing under Abington and Engel, it was the State who had placed Lynch in his position of authority, and therefore he, too, was subject to the same prohibition.

Moreover, in the instant case, as we have noted previously, the Petitioner said his prayers for his own support. He said them aloud in the presence of the class. No one, and especially not the courts, would deny Petitioner the privilege of praying "before nine or after three" when not conducting class in a public school. Had the prayers been offered silently when the class was not in session, a different result well may have been reached in this case. The fact that Petitioner did utter the prayers audibly and in front of the class is what gives them the characterization of "religious exercises." The School Board was charged with the responsibility of assuring that no students were subjected to religious exercises which might be offensive to their own beliefs (or non-belief) even if they

were not required to participate. It is the fact that students are compelled to attend school and to be in the classroom when class is in session unless excused, that renders those students vulnerable to religious exercises to which they object and that is why the courts have consistently held that anything done in the classroom by the teacher during regular classroom time which promotes religion is forbidden by the constitutional requirement of the separation of state and church. And, as we have noted, the fact that those who do not wish to listen are excused from the classroom is not an acceptable solution because a stigma can be attached to such children as the record in the present case discloses. Education in the public school classroom is for all the students at the same time and in the same place.

The School Board here, as school boards everywhere, must be vigilant to assure that the wall between church and state is preserved. All

order directing him to cease and desist from his religious exercises.

III. Does the state, by terminating the employment of a public school teacher for conducting religious activities in his fourth grade classroom show a hostility for religion or establish a religion of secular humanism?

The philosophy of "secular humanism" or "religion of secularism" as it is also known, refers to the sense of affirmatively opposing or showing hostility to religion thus preferring those who believe in no religion over those who do believe in religion. **Abington, 374 U.S. at 225, 83 S.Ct. at 1573.** See **Citizens for Parental Rights v. San Mateo County Board of Education, 51 Cal. App.3d 1, 124 Cal. Rptr. 68 (1975).** Petitioner has misinterpreted what has been described as the governments "neutrality" toward religion as hostility. As stated in **Engel, 370 U.S. at 443, 82 S.Ct. at 1273,** "The First Amendment teaches that

APPENDIX A

a government neutral in the field of religion better serves all religious interests." The Commonwealth of Pennsylvania clearly has not preferred those who have no religious affinity over those who do. This is evidenced by the two provisions of the Code involved in this appeal. Section 1515(a) and 1516.1(a) provide respectively: (1) that the Bible and religious writings may be used and studied in a literature course, provided that course is on the secondary level and is elective and (2) that a silent and voluntary prayer is allowable in a classroom setting. A state which was hostile to religion would not make such provisions.

[11,12] Since we have determined that no violations of Petitioner's constitutional rights have taken place, we must now resolve whether Petitioner's refusal to comply with the Superintendent's [5] directives to cease religious exer-

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5. Petitioner also challenges the Superintendent's authority to request an elementary school teacher to refrain from conducting religious activity in

cises in the classroom is a valid cause for termination. As noted earlier, persistent negligence and persistent willful violation of the school laws of the Commonwealth are valid causes for terminating a professional contract with a tenured teacher. Section 1122 of the Code, 24 P.S. §11-1122. In this case, the School Board and the Secretary found that Petitioner violated two provisions of the Code, to wit, Sections 1515(a) and 1516.1, 24 P.S. §§15-1515(a) and 1516.1.

Concerning the first provision which the School Board held that Petitioner has violated, the Petitioner testified that the Bible stories he read to his class paralleled the King James version of the Bible. Section 1515(a) of the Code provides that:

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5. (Cont'd) the classroom. We find this contention to be without merit. Obviously, the Superintendent of schools has a duty to make sure the schools and teachers within his control are not abridging the constitutional rights guaranteed to the students under his direction. He cannot tolerate illegal conduct in the schools under his supervision by condoning violations of the Public School Code.

APPENDIX A

Courses in the literature of the Bible and other religious writings may be introduced and studied as regular courses in the literature branch of education by all pupils in the secondary public schools. Such courses shall be elective only and not required of any student. (Emphasis added.)

It is quite apparent from the record in this case that Petitioner was teaching an elementary class, that his readings were not for the purpose of teaching the literary aspects of the Bible and that his purpose in reading was for his own spiritual edification and support which makes such reading a religious exercise. Clearly this conduct was a violation of Section 1515(a).

We have indicated already in this opinion wherein Petitioner violated Section 1516.1.

In this case, not only did Petitioner's activity go far beyond the allowed behavior of the school laws, of this state, but he acted

APPENDIX A

persistently,[6] negligently,[7] and willfully in the face of many demands by the superintendent of schools to cease and desist from conducting religious activities in school. In fact, Petitioner went as far as expressing his intent to continue these activities even though he was warned to do so would endanger his job.

Affirmed.

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6. Persistent has been defined by the courts as a "series of individual incidents, or as one incident carried on for a substantial period of time." Gobla, 51 Pa. Commonwealth Ct. at 543, 414 A.2d at 774.

7. In Harris v. Commonwealth, 29 Pa. Commonwealth Ct. 625, 372 A.2d 953 (1977), citing Johnson v. United School District Joint School Board, 201 Pa. Superior Ct. 375, 191 A.2d 897 (1963), the Commonwealth Court stated that a teacher's refusal and failure to obey her super-

APPENDIX A

ORDER

AND NOW, this 15th day of March, 1982, the dismissal of Lloyd Fink as a professional employee of the Warren County School District is hereby affirmed.

PALLADINO, J., did not participate in the decision of this case.

APPENDIX B

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

LLOYD F. FINK, Appellant	:	
v.	:	Teacher Tenure Appeal No. 25-78
BOARD OF EDUCATION, WARREN COUNTY SCHOOL DISTRICT, Appellee	:	

OPINION

Lloyd F. Fink, Appellant herein, is appealing the decision of the Board of Education of the Warren County School District, Appellee herein, dismissing him for persistent negligence and persistent and willful violation of the school laws.

FINDINGS OF FACT

Having determined that the Findings of Fact of the Board of Education of the Warren County School District are supported by substantial evidence on the record, we adopt those findings. We note that appellant also considers the findings

APPENDIX B

of the Board to be accurate. (See Brief of Appellant, p.2).

1. Appellant, Lloyd Fink, is a professional employee who has been a teacher in the Warren County School System, under a professional employee contract, at the Irvine Elementary School since 1963.

2. John E. Binney is the Acting Superintendent of Schools for the Warren County School District. Before entering into the duties of his office, he subscribed to the oath of office prescribed by the School Code of Pennsylvania affirming to support, defend and obey the United States Constitution and the Constitution of the Commonwealth of Pennsylvania.

3. The Board of Directors of the Warren County School District, upon recommendation of John E. Binney, Acting Superintendent of Schools, who had investigated allegations of classroom religious practices by Appellant, Lloyd Fink, unanimously voted at the regular monthly meet-

APPENDIX B

ing, April 11, 1978, to institute proceedings to terminate the employment of Lloyd Fink as a professional employee.

4. The Board of School Directors furnished Mr. Fink with a detailed written statement of charges upon which his contemplated dismissal was based.

5. A written notice signed by the President and attested by the Secretary of the Board was forwarded, by registered mail, to Mr. Fink stating the date, time and place of the hearing, which hearing was no sooner than 10 days after the written notice.

6. Mr. Fink was suspended as a professional employee of the Warren County School District pending the conclusion of the proceedings in regard to Mr. Fink's dismissal.

7. The school board conducted a hearing on May 18, 1978 which was public at the request of Mr. Fink. Seven members of the Board were present.

APPENDIX B

8. All testimony at the hearing was recorded by competent, disinterested public stenographer.

9. The uncontroverted evidence, shown by testimony at the hearing, indicated that Mr. Fink was conducting activities of a religious nature in the classroom in that he read Bible stories twice daily, once in the morning and once in the afternoon; prayed an extemporaneous prayer of his own wording, with bowed head and closed eyes; and offered explanatory comments on the Bible stories.

10. On February 3, 1978, John E. Binney, Acting Superintendent of Schools, met with Mr. Fink at which time Mr. Fink readily acknowledged the aforementioned activities. The Board finds that Mr. Binney informed Mr. Fink that these activities were prohibited and that if such practices continued, Mr. Fink's job could be placed in jeopardy.

APPENDIX B

11. Parents of two children in Mr. Fink's class, upon learning of the activities in question, complained to Mr. Gordon Sutton, the Principal of Irvine Elementary School and Mr. Fink's immediate supervisor. These two children were excused from the class (first kept in the hallway and then later instructed to go to the library) and were instructed by Mr. Fink to learn the Preamble to the Constitution. Mr. Fink acknowledged that his prayer and the reading of Bible stories lasted from 10 to 15 minutes.

12. After the February 3, 1978 meeting and Mr. Fink's ready acknowledgement of the questioned activities, Mr. Binney wrote a Cease and Desist Order wherein Mr. Fink was instructed to stop the religious practices which he acknowledged were being conducted in his class.

13. At subsequent meetings and in communications between Mr. Binney and Mr. Fink, Mr. Fink informed Mr. Binney that he (Mr. Fink)

APPENDIX B

was not committing any illegal act and intended to continue his activities. The testimony indicated that Mr. Fink discontinued using the Lord's Prayer but substituted his own extemporaneous prayer and that Mr. Fink refrained from directly reading from the Bible but read selected stories from "The Bible Story Volume VII" by Arthur S. Maxwell, Review and Herald Publishing Association of Washington, D.C. (Copyright 1956).

14. Mr. Gordon Sutton, Irvine Elementary School principal, met with Mr. Fink and requested that he stop the activities in question. Mr. Sutton further advised Mr. Fink that if he did not stop the activities in question, he must be prepared for possible ramifications. Mr. Fink replied that he was not breaking the law and intended to continue his practices notwithstanding the positions of his supervising principal and the Acting Superintendent. Mr. Fink also stated that on one occasion he had read three chapters

APPENDIX B

from the book of Jonah when he had left "The Bible Story Volume VII" at home. Mr. Sutton indicated that to his knowledge Mr. Fink altered his exercises by substituting the Lord's Prayer with a extemporaneous prayer and that he ceased any prayers or Bible stories in the afternoon and recited the prayer and Bible stories only in the morning.

15. Mr. Fink admitted that he had been praying the Lord's Prayer, without comment, and that the children could join in if they so desired. He also testified that he read from "The Bible Story Volume VII" and did make occasional comments to define or explain a word or phrase.

16. Mr. Fink, testifying on his own behalf, acknowledged a conference with Mr. Gordon Sutton after the complaints of several parents and that as a result of that conference Mr. Fink substituted extemporaneous prayer for the Lord's Prayer. Mr. Fink stated that the children were

APPENDIX B

not required to join but could do so if they desired. Mr. Fink said the prayer with bowed head and closed eyes.

17. Mr. Fink continued the prayers after receiving a written Cease and Desist Order from Mr. Binney, Acting Superintendent. Mr. Fink claimed that he had a right to do so under the First Amendment of the United States Constitution and that he did not want to lose that right.

18. Mr. Fink admitted to the Board that he read daily several pages from "The Bible Story Volume VII" and that in his opinion the stories coincided with the King James version of the Bible.

19. Mr. Fink testified that the Acting Superintendent did not have the right to tell him to do things contrary to his conscience and he felt that he had not disobeyed any laws.

20. Mr. Fink presented testimony at the hearing that his evaluation report was very good

APPENDIX B

laws. Appellant has vigorously argued that this action by the school board has deprived him of exercising certain constitutional rights. Specifically, it is contended that his dismissal by Appellee was in contravention of his freedom of religion, freedom of speech, right to academic freedom, right to privacy and right to equal protection of the laws as guaranteed by the United States Constitution.

Appellee contends that Mr. Fink's religious practices in the classroom are unprotected by the First Amendment of the United States Constitution. The Board argues that Mr. Fink's refusal to cease his religious activities, after repeated warnings, constituted persistent negligence and a willful violation of the school laws of the Commonwealth of Pennsylvania.

We conclude that Mr. Fink's religious activities in the classroom were a clear violation of the school laws. Furthermore, his refusal to

obey the directives of his superiors constituted a violation of the school laws and persistent negligence. Therefore, the decision of the board of school directors of the Warren County School District is sustained.

I. Constitutional Questions

We recognize that the decision rendered by the school district raises issues of constitutional importance. Counsel for Mr. Fink and counsel for the school district have thoroughly briefed and argued these issues at length. However, it is not within the power of an administrative agency to rule on the constitutionality of statutes. Such determinations must be made by the judicial branch of government. Marbury v. Madison, 1 Cranch 127, 2 L. Ed. 60 (1803); Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946). Having properly raised these issues, Appellant has preserved his right to seek a judicial resolution by the Commonwealth

APPENDIX B

Court should he elect to appeal this decision.

II. Willful Violation of the School Laws

In the landmark case of School District of Abington Township v. Schempp, 374 U.S. 208, 83 S. Ct. 1560 (1963), the Supreme Court of the United States held that Section 1516 of the Pennsylvania Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §15-1516, was unconstitutional. That statute provided:

> At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

Since the decision in the Schempp Case, supra, the General Assembly has enacted two statutes that deal with religious activity and prayer in the classroom. We conclude that Mr. Fink's conduct violated both of these statutes.

APPENDIX B

Section 1516.1 of the Public School Code, Act of March 10, 1949, P.L. 30, as amended by the Act of December 6, 1972, P.L. 1412, 24 P.S. §15-1516.1, now provides:

> (a) In each public school classroom, the teacher in charge, may or if so authorized or directed by the board of school directors by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent prayer or meditation with the participation of all the pupils therein assembled. (b) The silent prayer or meditation authorized by subsection (a) of this section is not intended to be, and shall not be conducted as, a religious service or exercise, but shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day. (emphasis added.)

This section clearly states that if there is to be any type of prayer in the classroom it must be silent and it must be voluntary. In response to the Schempp holding, the Legislature has emphatically stated that there are to be no religious

APPENDIX B

exercises in the classroom. If any individual in a classroom elects to ponder a religious theme during the period of silence, that is his or her right. However, there exists no statutory right for a teacher to daily hold a religious exercise in the classroom.

We find that Appellant's activities constituted religious exercises held in direct violation of Section 1516.1(b). Mr. Fink read from the Holy Bible and recited the Lord's Prayer daily. When ordered to cease and desist, he read Bible stories and recited an extemporaneous prayer. This was done out loud, in a reverent manner, at a regular time every school day. We find no material difference between reading the Bible and reading Bible stories that follow the King James version of the Bible. The activities resulted in the communication of specific religious doctrine and ideals. These are exactly the type of exercises that Section 1516.1 of the School Code prohibits.

APPENDIX B

We note the sincerity of Mr. Fink's religious convictions and his undisputed ability as a classroom teacher. However, the law does not permit Appellant to engage in recitation of prayer and Bible stories in the classroom.

Even if we found that Mr. Fink's activities were not religious exercises and therefore not violative of Section 1516.1, these activities also violated Section 1515 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended by the Act of December 22, 1965, P.L. 1144, 24 P.S. § 15-1515. That section provides, inter alia,

> (a) Courses in the literature of the Bible and other religious writings may be introduced and studied as regular courses in the literature branch of education by all pupils in the secondary public schools. Such courses shall be elective only and not required of any student. (emphasis added.)

There is no evidence whatsoever that Mr. Fink was conducting a literature course. The writings were not used as part of a regular course on

APPENDIX B

literature, but were introduced as a part of a reverent religious exercise. Furthermore, these activities were carried on in an elementary rather than a secondary classroom. The children were not in an elective course; they were in a class which they were required to attend. We hold that these activities were held in direct violation of this statute.

Not only do the violations of these statutes constitute a willful violation of the school laws, Appellant's disregard of the orders of his superior also constitutes a "willful violation of school laws." In Harris v. Commonwealth, Secretary of Education, 29 Pa. Commw. Ct. 625, 372 A.2d 953 (1977), the Commonwealth Court stated,

> We have interpreted 'willful violation of the school laws' to include not only violations of the Code, but also violations of rules and orders of the employee's superior. Id. at 957.

Mr. Fink not only ignored the repeated warnings

and the Cease and Desist Order of his superior, he also expressed his intent to continue the course of conduct at issue. We hold that this decision by Mr. Fink was a willful violation of the school laws.

III. Persistent Negligence

The term "persistent" has been defined in Lucciola v. Pennsylvania Secretary of Education, 25 Pa. Commw. Ct. 419, 360 A.2d 310 (1976):

> As a general proposition, 'persistent' is defined as 'continuing' or 'constant' . . . In particular application, persistency characterizes a violation of the school laws by a professional employee where the violation occurs either as a series of individual incidents . . . or as one incident carried on for a substantial period of time. Id. at 312.

Mr. Fink's actions occurred every day. He expressed his intent to continue religious exercises as part of his daily classroom schedule. We conclude that this clearly amounts to persistent conduct as defined by Commonwealth Court.

APPENDIX B

Finally, we must determine whether or not a persistent violation of the school laws or a persistent refusal to follow a superior's orders is negligence. In Johnson v. United School District Joint School Board, 201 Pa. Super. 375, 191 A.2d 897 (1963), a teacher refused to attend an "Open House" after being ordered to do so on three occasions. The Court stated,

> The plaintiff here not only closed her eyes to a directive, but arrogantly persisted in her announced intention not to comply with the directive. This conduct was an act of negligence and would also be classified as persistent and willful violation of the school laws. Id. at 901.

Although Mr. Fink did not act arrogantly, he closed his eyes not only to a directive but also to the School Code. Like Ms. Johnson, Mr. Fink announced his intention to continue his course of conduct. This was clearly an act of negligence as the court has defined that term.

Accordingly, we make the following:

APPENDIX B

ORDER

AND NOW, this 18th day of May, 1979, it is hereby Ordered and Decreed that the Appeal of Lloyd F. Fink is hereby dismissed, and that the decision of the Board of School Directors of the Warren County School District, dismissing Mr. Fink on the grounds of willful violation of the school laws and persistent negligence is affirmed.

s/R.G.S.

Robert G. Scanlon
Secretary of Education
Pennsylvania Department
of Education

APPENDIX C

IN THE COMMONWEALTH COURT OF PA.

LLOYD L. FINK 1261 C.D. 1979

vs.

BOARD OF EDUCATION
OF WARREN COUNTY
SCHOOL DISTRICT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lloyd L. Fink, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Commonwealth Court entered in this action on March 15, 1982. This Appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

December 17, 1982

Supreme Court of
Pa. #226 A/82
cc: Joseph Massa, Esq.

s/J.McG.
JAMES McGARRITY, ESQ
Attorney for Appellant